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IN THE

Supreme Court of the United States

October Term, 1962

No. 880

SLOAN'S MOVING & STORAGE CO. INC.,
Appellant,

v.

UNITED STATES OF AMERICA and INTERSTATE COMMERCE COMMISSION,
Appellees,

AND

UNITED PARCEL SERVICE, INC.,
Intervenor-Appellee.

REPLY TO APPELLEES' AND INTERVENOR'S MOTIONS TO AFFIRM

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This brief reply is directed to the motions to affirm.

1. Appellees' contention that the appeal presents "no substantial question" because the "determination of whether a certificate of public convenience and necessity should issue is a matter peculiarly for the Commission" (M.A. 3)* is a homily designed to foreclose inquiry into

* The symbol "M.A." refers to the motion to affirm followed by the page number. "I.M." refers to Intervenor's motion followed by a page number. Reference to the Jurisdictional Statement is identified by the Symbols "J.S.".

the Commission's decisional processes. This Court will not assume that there is a sufficient "legal and factual basis for the Commission's order" (M.A. 3) without examining the whole record [*Universal Camera Corp.* v. *National Labor Relations Board*, 340 U. S. 474 (1951); *Interstate Commerce Commission* v. *The New York, New Haven and Hartford Railroad Co., et al.*, 31 U. S. L. Week 4363 (U. S. Apr. 22, 1963)]. If the record in this case is reviewed, the Commission's order cannot be sustained even though a part of it may be said to be supported by some evidence [*Willapoint Oysters, Inc.* v. *Ewing*, 174 F. (2d) 676, 697, cert. denied 338 U. S. 860 (1949)].

Intervenor's tiresome recitation of the number of pages of the record, the large number of witnesses (whose testimony was so vague as to foreclose application of the thesis that it is the Commission's function to weigh probity and relevance) and the size of the Examiner's Report (I.M. 6, 17) does not fill the void which characterizes the challenged order. It is an ancient lesson that when the evidence supporting the Commission's order is exiguous and conflicting evidence is "so preponderant that by comparison the meager facts * * * shrink to such a comparative insignificance that they cannot be said to be substantial in the light of the entire record, a finding based upon them has not been permitted to stand" [*N. L. R. B.* v. *Falls City Creamery Co.*, 207 F. 2d 820, 826 (C. A. 8th, 1953)].

2. Appellees and Intervenor contend that a plenary review should not be entertained because the Examiner concluded first that appellant could not perform the full service proposed by Intervenor and second, since only a small part of appellant's traffic would be exposed to diversion, there would be no adverse effect (M.A. 4;

I.M. 10, 12). This sophistry assumes that the record supports the conclusions which the Examiner reached and the Commission adopted. An answer to these contentions has already been given (J.S. 11-13). The inescapable fact is that there was no evidence at all of a need for a "complete service" to specific points in the territory covered by Intervenor's application. The true facts are that: (a) there was no statement of present or anticipated volume of shipments into or out of the Missouri area served by appellant; (b) there was no description or enumeration of the points in the Missouri area to which service would be required; (c) there was no evidence as to the volume of parcels to be shipped or their dimensions or weight; (d) there were no verifiable complaints about existing service and if a complaint was registered, there was not a single, specific, identifiable case cited.

Assuming *arguendo*, that there was a need for service beyond appellant's territory, the Commission could have granted a part of the authority and excluded therefrom the territory now adequately covered by appellant and others. In hundreds, if not thousands of cases, a part of an application has been granted where the Commission has found that a particular area, embraced within the larger territory applied for, is adequately served by existing carriers. The overwhelming majority of carriers regulated under Part II of the Interstate Commerce Act have limited territorial grants and the Commission has denied applications where these territories were subject to invasion by applicants seeking authority to serve the same and additional territory.

As for the claim that appellant will not be adversely affected, the record provides a complete refutation. Appellant's *Exhibit 346*, which covered a two week period,

reflected that appellant handled a total of 25,876 packages; 5,522 of these shipments were interstate in nature and of these, 3,594 or 65% were wholesale deliveries (Tr. 5982-5983). Contrary to the appellees' claim (M.A. 4), appellant had experienced a loss of retail traffic and was obliged to rely, more and more, upon its wholesale business (Tr. 5979, 5980) but when appellant was compelled to compete with Intervenor for intrastate wholesale shipments, its overall wholesale trade declined to 25.46% (Tr. 5982, 5983) whereas, prior to the grant of competitive authority to Intervenor its wholesale business amounted to 65% (Exhibit 346 and Tr. 5983). Manifestly, whenever appellant has encountered competition from Intervenor, the more desirable wholesale business has declined so that appellant has had to rely upon the less profitable retail business.

Actually, whether the amount of traffic which is subject to diversion is large or small is irrelevant: the Commission has uniformly ruled that all segments of a carrier's traffic are vital for its stability and this is particularly true with respect to package freight which, as Intervenor's witness admitted, can only be successfully handled if a large volume is available. In these circumstances, the Commission was and is charged with the obligation to protect appellant's traffic, which it utterly failed to do in this case.

3. It is argued that even if appellant is capable of rendering the service required by the shippers, the Commission may, nevertheless, certify additional service (M.A. 4; I.M. 13). The errors of this reasoning are twofold: (a) the Commission certified additional service in this case because it held, incorrectly, that appellant was not capable of providing service; and (b) it is incorrect to say that additional service can be authorized if present

carrier facilities are adequate. The fact is that neither the appellees nor the Intervenor could identify a specific instance of inadequate service to or from the Missouri points served by appellant. Of course, Intervenor refers to so-called shipper complaints (I.M. 11) but of the hundreds of shippers served by appellant, five specious "complaints" were alleged and the record shows that: (a) one complainant (Marx & Haas Korrect Co.) was never served by appellant and there was not the slightest evidence that a complaint was actually filed (Tr. 5945); (b) another complainant (Hugo Herzberg Co.) was never served by appellant except to deliver packages received by parcel post and appellant is still serving this company in connection with parcel post traffic (Tr. 5945-5951); (c) for the third complainant, Sligo Company, appellant handled 13 parcels in 1957 and one (1) package in 1958 without complaint and there is no record of any other complaint [Sligo has not accepted appellant's offer of service because Sligo operates its own trucks (Tr. 5951-5952)]; (d) the fourth complainant was A. S. Aloe Company which appellant served from June 1958 to March 1959 and not a single complaint was ever made; indeed, Aloe's parent company continues to use appellant without complaint (Tr. 5953-5954); (e) the fifth complainant was Wash Machine Parts Company and the dispute arose because that company refused to follow the simple precautions which appellant employed for handling C.O.D. shipments (Tr. 5955). This explains Intervenor's brash statement that there was no "doubt" about the need for Intervenor's services (I.M. 9). The guiding principle is clear: a new operation will not be granted "until it has been established that existing carriers are unable or unwilling to transport properly, efficiently, and economically the available traffic." [*Southern Express, Inc. Common Carrier Application*, 62 M.C.C. 35, 45 (1953); *Law & Ingham Transportation Company, Inc. Extension—Pig Iron*, 13 Federal Carrier Cases (CCH., Par. 84,788, 1959)].

Indeed, if there was a need for additional service from and to the Missouri points served by appellant, the Intervenor's application could not have been granted because the evidence shows that shippers who supported the application made no attempt to use appellant's services and are "in no position to determine whether such carrier's service is inadequate for its needs". [*Leonard Bros. Trucking & Storage Co. Inc. Extension*, 82 M.C.C. 623 (1961); *St. Mary's Trucking Co., Inc. Extension—Michigan*, 82 M.C.C. 502 (1961)]. The Commission's "wide range discretionary authority" upon which the appellees and Intervenor relies (M.A. 5; I.M. 13, 17) does not mean that a Court must rubber-stamp arbitrary administrative findings or findings based upon palpably insubstantial evidence or which omit essential basic findings. [*United States* v. *B. & O. R. Co.*, 293 U. S. 454 (1935); *Atchison, T. & S. F. Ry. Co.* v. *United States*, 295 U. S. 193 (1935); *Standard Oil Co. (Indiana)* v. *United States*, 283 U. S. 235 (1931); *Florida* v. *United States*, 282 U. S. 194 (1931)].

A grant of new authority is not permissible unless there is persuasive proof that (a) the new service will serve a useful public purpose, responsive to a public demand or need which cannot and will not be served as well by existing carriers and (b) the applicant can serve this purpose without endangering or impairing the operations of existing carriers [*Pan American Bus Lines Operations*, 1 M. C. C 190 (1936); *C & E Trucking Corp. Extension-Whole Condensed Milk*, 72 M. C. C. 421 (1957); *Peterson Common Carrier Application*, 30 M. C. C. 10 (1941); *Clark Common Carrier Application*, 8 M. C. C. 43 (1938); *Cleveland Common Carrier Application*, 7 M. C. C. 521 (1938); *Richards Extensions*, 6 M. C. C. 80 (1938); *Coffman Common Carrier Application*, 3 M. C. C. 93 (1937); *Norton Common Carrier Application*, 1 M. C. C. 114 (1936)]. Because there was no such evidence, the

Examiner and the Commission, improperly imposed the burden of proof upon the appellant (J. S. 9), when in fact, it was Intervenor's burden to "establish by clear and convincing evidence that the available carriers cannot properly handle the traffic moving to a particular point or area and that it offers a service which would meet the needs of the public and the particular shippers involved". [*Great Southern Trucking Co. Extension—Barton Airfield, Fla.*, 63 M. C. C. 57, 65 (1959); *Monterrey Freight Forwarding Corp.—Contract Carrier Application*, 68 M. C. C. 456, 458 (1956); *Anton Vidas Contract Carrier Application*, 61 M. C. C. 439, 442-443 (1951)].

4. The Intervenor confesses that it relies upon the alleged deficiency of parcel post service to support the Commission's order (I.M. 6-7). But the relevant inquiry was not the adequacy or inadequacy of parcel post service but whether the present and future public convenience and necessity required Intervenor's proposed motor carrier service. An examination of the record references cited by Intervenor (I.M. 8) shows that the testimony did not establish inadequacy of motor carrier service.[1]

5. The appellees misunderstood appellant's so-called "concession" (M.A. 3) that adequacy of existing service is not a bar to approval of an application (J.S. 10). In this case, however, the Commission justified its grant of authority upon the alleged inadequacy of the existing service and the absence of adverse effect. Now, there being not an iota of evidence of inadequacy of service within appellant's territory (and the Examiner did not make such a finding) adequacy of service was a cardinal issue. Even if the absence of a finding of inadequacy of service will not bar the grant of operating authority, inadequacy of existing facilities is a basic element in determining public need and unless inadequacy is proved, a Certificate will not be granted [*Hudson Transit Lines, Inc.* v. *United*

[1] Indeed, there was no probative evidence of the volume of parcel post shipments moving to specific points or the frequency thereof.

States, 82 F. Supp. 153 (S. D. N. Y., 1948); *Merlin E. Naylor Extension of Operations—North Carolina*, 8 M. C. C. 673 (1938); *Petroleum Transit Corp. Common Carrier Application*, 3 M. C. C. 607 (1937); *Clifford Wean Common Carrier Application*, 2 M. C. C. 735 (1937)]. In short, the fact that a finding of inadequacy is not required, does not warrant issuance of a new Certificate when service within a given territory is adequate.

6. The appellees and Intervenor suggest that the principal issues in the case were reached in *Railway Express Agency, Inc.* v. *United States*, 205 F. Supp. 831 (S. D. N. Y., 1962) (M.A. 4) and in *Yale Transport Corp.* v. *United States*, 185 F. Supp. 96, aff'd per curiam 365 U. S. 566 (I.M. 10). To begin with, neither case involved a single carrier, like appellant, who provided concededly expert service for parcel post type of shipments at rates lower than, or comparable to, those proposed to be assessed by Intervenor and the first cited case was pursued primarily upon the Ashbacker principle [*Ashbacker Radio Corp.* v. *F. C. C.*, 326 U. S. 327 (1945)].

7. Appellee and Intervenor claim that the issue of illegal control is not properly before this Court (M.A. 5; I.M. 19), but if it is,[2] then the appellant's contentions are without merit (M.A. 5; I.M. 20-23).

Intervenor also implies the Commission has absolved it and its affiliates from the requirement of Section 5 approval (I.M. 19-20) and that the District Court in *Yale Transport Corp.* v. *United States* [185 F. Supp. 96 (S. D. N. Y. 1960), aff'd *per curiam* 365 U. S. 566 (1961)] held that there was no control relationship (I.M. 20) but Intervenor's reliance upon past approval is unwarranted. In the *Refiners Transport & Terminal Corporation—Purchase—Marshall Transport Co.* (39 M. C. C. 271, 276), the Commission held:

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[2] The record shows that this issue was raised (J.S. 19; Tr. 468-469).

> "If we have approved applications in the past where the factual situation as to the point herein involved correspond to that which is presented herein, that would afford no basis for us to administer the statute contrary to its provisions. Our authority extends only to the administration of the statute enacted by Congress, and does not extend to the determination of a 'policy' not expressed in the statute itself."

The Commission has recognized that it cannot approve any transaction where an illegal control relationship exists [*Nicholas, Fayette & Greenbrier R. Co. Lease*, 261 I. C. C. 546 (1945)]. The plain fact is that since the decision in *Yale Transport Corp.* v. *United States, supra*, the Intervenor and its parent and affiliates, were apprised of the unlawful control situation which it could and should have rectified and Intervenor knew, when the instant application was filed, that if an unapproved control relationship exists the Commission could not approve its application [*M. J. Hannon—Control—Hannon Motor Lines, Inc.*, 39 M. C. C. 620 (1944); *Schwerman Trucking Co.—Control—Schwerman Trucking Co. of Texas*, 80 M. C. C. 382 (1959)]. Finally, to urge that the issue is not jurisdictional (M.A. 5) misreads this Court's decision in *Alleghany Corporation* v. *Breswick & Co.*, 353 U. S. 151 (1957).

CONCLUSION

The Motions to Affirm Should Be Denied

Respectfully submitted,

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